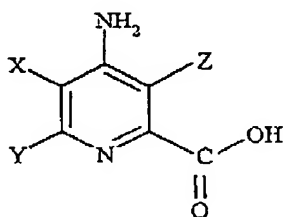


in which X represents H or F; and Y represents a C₁-C₄ alkyl group optionally substituted with a C₁-C₄ alkoxy or thioalkoxy substituents or a C₂-C₃ alkenyl group.

Fields *et al.*, on the other hand, is directed to the 2-carboxylic acid derivatives and 4-amino derivatives of a compound of the formula



in which X represents, among other things, H and halogen; Y represents halogen, C₁-C₆ alkoxy, C₁-C₆ thioalkoxy, aryloxy, heteroaryloxy or trifluoromethyl; and Z represents, among other things, halogen.

The present invention is clearly distinguished from Fields *et al.* in the definition of Y. In the present invention, Y is an unsubstituted or an alkoxy or thioalkoxy substituted C₁-C₄ alkyl group or a C₂-C₃ alkenyl group; in Fields *et al.*, Y is a halogen, an alkoxy, a thioalkoxy, an aryloxy, heteroaryloxy or a trifluoromethyl group. An unsubstituted or alkoxy or thioalkoxy substituted alkyl group or an alkenyl group is not an alkoxy, an alkythio or a trifluoromethyl group. There is no overlap of the claimed invention with the disclosure of Fields *et al.* Thus Fields *et al.* does not anticipate the present invention with respect to Y and the present invention meets the requirements of 35 U.S.C. §102.

Claims 1-6 are rejected under the judicially created doctrine of obviousness-type double patenting over claims 1-3 and 4-14 of Fields *et al.*, a patent commonly owned with the present application. The application of obviousness-type double patenting requires the rejection of a claim when the claimed subject matter is not patentably distinct from the subject matter claimed in a commonly owned patent. The issue then, is whether the present claims are patentably distinct over the claims of Fields *et al.*

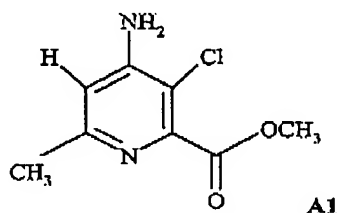
To more clearly demonstrate the unobviousness of the present invention over Fields *et al.* and the invention taught or suggested therein, the Applicants submit herewith an Affidavit under 37 C.F.R. §1.132 by Mr. Paul Schmitzer.

This Rule 132 Affidavit is based on the test for unobviousness as set forth in *Ex parte Dole*, 119 USPQ 260. Since this test for unobviousness appears to be basic law today, and this decision has not been overruled or overturned, such test was employed.

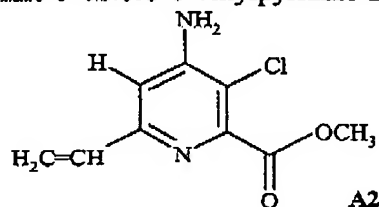
Ex parte Dole is directed to the same issue as in the present rejection. In essence, the Board, in this decision, set forth requirements which must be met if patentable distinctions are to be found between analogous compounds. One such requirement is that the activity of the claimed compounds must be "unexpectedly advantageous" over that of the prior art compound. Another requirement is that any affidavit filed must set forth sufficient data (facts) to permit real evaluation, rather than it being based on unsupported statements of conclusion or opinion. The other basic requirement made by the Board is that any advantage or area of advantage which is found or set forth must itself find support in the specification as filed.

The Rule 132 Affidavit of Mr. Schmitzer compares the pre-emergent activity of three compounds of the present invention, viz.,

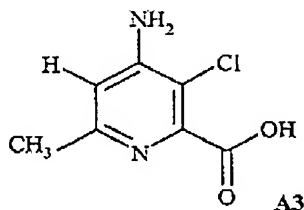
Methyl 4-amino-3-chloro-6-methylpyridine-2-carboxylate



Methyl 4-amino-3-chloro-6-vinylpyridine-2-carboxylate

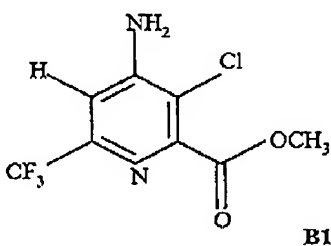


4-amino-3-chloro-6-methylpyridine-2-carboxylic acid

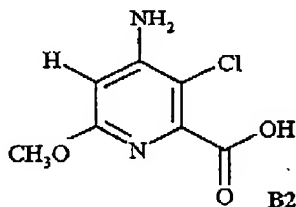


with the closest compounds disclosed or suggested by the prior art

Methyl 4-amino-3-chloro-6-(trifluoromethyl)pyridine-2-carboxylate



4-amino-3-chloro-6-methoxypyridine-2-carboxylic acid



It is understood than any showing (data) set forth to rebut a presumption of obviousness over the prior art reference, must meet the requirements of Ex parte Dole and in addition must be sufficient to establish a difference in kind and not indicate a mere difference in degree.

The question which must be answered is whether or not a sufficient showing has been made in the affidavit presented herewith.

As indicated from the data presented in the Affidavit of Mr. Schmitzer, the presently claimed compounds provide complete control of broadleaf plants at a concentration that is safe to oilseed rape while the compounds of Fields *et al.* are extremely damaging to oilseed rape at the same concentrations. The selectivity of the

compounds of the present invention to the crop oilseed rape compared to the compounds of Fields *et al.* are true differences in kind, not mere differences in degree.

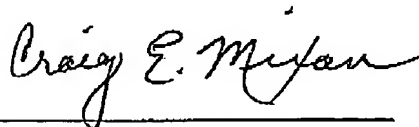
The compounds chosen for the comparative showing are the closest compounds taught by the prior art. The compounds differ only in their substitution at the 6-position of the pyridine ring.

As indicated by the data presented in the Affidavit of Mr. Schmitzer, the presently claimed compounds demonstrate selectivity lacking in the closest compounds disclosed in Fields *et al.* and are patentably distinct therefrom.

To comply with the request of the Examiner, a clean copy of the Belgium reference and an English translation is being provided with this response.

On the basis of the above remarks, reconsideration of this application and its early allowance are requested.

Respectfully submitted,



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